

Chung Tain Kong @ Chung Fook Chong v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–34
OF 2009ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA AND HASHIM
YUSOFF FCJ

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30 NOVEMBER 2009

Criminal Law — Murder — Defence — Right of private defence — Whether established — Burden of proof — Whether on accused — Whether standard of proof on preponderance of probabilities — Whether accused acted in self-defence — Victim physically inferior and weaker — Whether there was imminent danger to accused's life — Whether pleas of private defence corroborated — Penal Code s 100(a) & (b)

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The appellant was convicted and sentenced to death by the High Court for murdering his girlfriend ('the deceased'). His appeal to the Court of Appeal was dismissed and hence this appeal. The only issue raised in the appeal was whether the appellant was acting in self-defence when he killed the deceased. Learned counsel for the appellant submitted that it was the deceased who was the aggressor. He based his argument on the injuries sustained by the appellant, particularly those on his neck and arm. He submitted that since the deceased had caused grievous injuries on the appellant's neck, that meant that she was the aggressor. PW4 had testified that he had rushed into the room in question upon hearing the deceased screaming out his name and saw the deceased lying on the floor and the appellant standing near the deceased holding something shiny. Then PW4 saw the appellant inflicting his own injuries by stabbing his own stomach and neck. Learned counsel for the appellant submitted that PW4's testimony regarding the injury to the appellant's neck was contradicted by the evidence of PW6 who had followed PW4 into the room. It was submitted that PW6 never said anything about the appellant injuring himself. Learned counsel for the appellant also raised the issue that the trial court had considered the exculpatory statement of the appellant.

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Held, dismissing the appeal:

- (1) Even if PW6 never said anything about the appellant stabbing himself, it did not mean that PW4's testimony which said that he did, could not be believed. Although PW6 said she did not see the appellant injure himself, she did see the appellant holding something shining towards his throat after which she left the room as she was scared (see para 11).

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- A (2) The trial judge found that the stabbing to death of the deceased by the appellant was not justifiable and unreasonable and such act was in excess of private defence especially done to a physically inferior and weaker person. It was the appellant who initiated the aggression which culminated in his multiple stabbings of the deceased even after there was no imminent danger to his own life because the deceased had already fallen to the floor and was quite helpless at that material time when the appellant took the knife from her and stabbed her. His action was therefore not covered by the provisions of s 100(a) or (b) of the Penal Code (see paras 13 & 15).
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- C (3) There was nothing in the appellant's cautioned statement which said that he had acted in self-defence. The appellant could have easily said so in his cautioned statement. If he had, then it could have been used to corroborate his testimony in court (see para 16).
- D (4) The appellate court should not disturb the findings of facts by the trial judge unless they are against the weight of evidence. Having considered the evidence in its totality and the reasons given by the learned trial judge and the concurrent findings by the Court of Appeal, there was no reason to interfere with the decisions made (see para 17).
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[Bahasa Malaysia summary]

- F Perayu disabit dan dihukum mati oleh Mahkamah Tinggi kerana membunuh teman wanitanya ('si mati'). Rayuannya ke Mahkamah Rayuan ditolak dan justeru rayuan ini. Isu yang dibangkitkan dalam rayuan adalah sama ada perayu mempertahankan dirinya apabila dia membunuh si mati. Peguam perayu yang bijaksana menghujahkan bahawa si matilah merupakan penyerangnya. Hujahannya adalah berdasarkan kecederaan-kecederaan yang dialami perayu, terutamanya pada leher dan tangannya. Dia berhujah bahawa memandangkan si mati telah mengakibatkan kecederaan parah ke atas leher perayu, maka dialah penyerangnya. PW4 memberi keterangan bahawa dia menyerbu ke bilik tempat kejadian apabila mendengar si mati menjerit namanya dan melihat si mati terbaring atas lantai dan perayu berdiri berdekatan si mati memegang suatu objek bersinar. Kemudiannya PW4 melihat perayu mencederakan dirinya sendiri dengan menikam perut dan lehernya. Peguam perayu yang bijaksana menghujah bahawa keterangan PW4 berkenaan kecederaan leher perayu bercanggah dengan keterangan PW6 yang telah mengikut PW4 ke bilik tersebut. Dihujahkan bahawa PW6 tidak menyatakan apa-apa tentang perayu mencederakan dirinya sendiri. Peguam perayu yang bijaksana juga membangkitkan isu bahawa mahkamah bicara telah mempertimbangkan pernyataan ketidakbersalahan perayu.
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Diputuskan, menolak rayuan:

- (1) Walaupun PW6 tidak menyatakan apa-apa mengenai perayu menikam

dirinya sendiri, tidak bermaksud bahawa keterangan PW4 yang menyatakan bahawa perayu sememangnya berbuat sedemikian, tidak boleh dipercayai. Walaupun PW6 berkata dia tidak nampak perayu mencederakan dirinya sendiri, tetapi dia nampak perayu memegang sesuatu yang bersinar ke arah lehernya dan kemudian dia meninggalkan bilik tersebut kerana ketakutan (lihat perenggan 11).

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- (2) Hakim bicara mendapati bahawa tindakan perayu menikam si mati hingga mati adalah tidak berjustifikasi dan tidak wajar dan tindakan itu adalah berlebihan dengan pembelaan mempertahankan diri, lebih-lebih lagi terhadap orang yang lebih lemah. Perayu yang memulakan serangan yang berakhir dengan dia menikam si mati beberapa kali walaupun tiada lagi bahaya ke atasnya kerana si mati telah pun terlantar di atas lantai dan tidak berupaya pada ketika itu apabila perayu mengambil pisau daripada si mati dan menikamnya. Oleh itu, tindakannya tidak dilindungi oleh s 100(a) atau (b) Kanun Keseksaan (lihat perenggan 13 & 15).

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- (3) Tiada apa pun dalam pernyataan beramaran perayu yang menyatakan bahawa dia bertindak untuk mempertahankan diri. Perayu boleh sahaja menyatakan sedemikian dalam pernyataan beramarannya. Jika dia menyatakan sebegitu, maka pernyataannya boleh menyokong keterangannya di mahkamah (lihat perenggan 16).

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- (4) Mahkamah rayuan tidak harus mengganggu penemuan fakta-fakta oleh hakim bicara kecuali jika penemuan tersebut bertentangan dengan nilai keterangan. Setelah mempertimbangkan keterangan keseluruhannya dan juga alasan-alasan oleh hakim mahkamah bicara dan juga penemuan sejajar oleh Mahkamah Rayuan, tiada sebab untuk mencampuri keputusan yang dibuat (lihat perenggan 17).]

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Notes

For a case on defence, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1157.

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Cases referred to

Ahmad Shah bin Hashim v PP [1980] 1 MLJ 77, FC (refd)

Lee Thian Beng v PP [1972] 1 MLJ 248, FC (refd)

PP v Abdul Manap [1956] MLJ 214, HC (refd)

PP v Ngoi Ming Sean [1982] 1 MLJ 24, HC (folld)

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Legislation referred to

Penal Code s 100(a), (b)

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Appeal from: Criminal Appeal No S-05-44 of 2003 (Court of Appeal, Putrajaya)

- A *Chau Chin Tang (Yong Pei Yi with him) (Chau & Thien) for the appellant. Ahmad bin Bachee (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*
- B **Hashim Yusoff FCJ (delivering judgment of the court):**
- C [1] The appellant was convicted and sentenced to death by the High Court at Kota Kinabalu, Sabah for murdering his girlfriend (the deceased). His appeal to the Court of Appeal was dismissed. Hence his appeal to this court.
- [2] The facts of the case have been sufficiently narrated in the judgment of the Court of Appeal (see the appeal record Vol I pp 5–7, paras 10–16).
- D [3] There was only one issue raised in the appeal before us ie that the appellant was acting in self-defence when he killed the deceased.
- E [4] Learned counsel for the appellant submitted that it was the deceased who was the aggressor. He based his argument on the injuries sustained by the appellant, particularly those on his neck and arm. This can be seen from the medical report of the appellant, (exh D1) (see the appeal record Vol 2 (2) at p 257, para (2)I, II and III and para (3)I and II). He submitted that since the deceased had caused grievous injuries on the appellant's neck, that would mean that she was the aggressor.
- F [5] It was also his contention that the learned trial judge did not consider the fact that it was the deceased who had inflicted the grievous wound to the appellant's neck. That being the case, he submitted therefore that it gave the appellant the right of self defence even to the extent of causing death to his assailant.
- G [6] On the same issue, learned counsel for the appellant submitted that although the learned trial judge had considered the pathologist's (PW2) evidence, he did not make any positive finding as to who was the aggressor.
- H [7] With respect, we are unable to accept his argument. The learned trial judge in his grounds of judgment (at pp 270–271 of the appeal record Vol 2 (2)) said:
- I PW2 told the court that injuries No 12 to 19 (of the deceased) as a group, is usually seen in someone who is trying to defend oneself, especially injury No 16 on the right thumb is normally seen in someone who is trying to grab hold of sharp object. These injuries according to PW2 are on the back of the forearm or hand indicating that the deceased tried to fend off attack and also trying to grab sharp

object. Based on what is said by PW2 it is the court's view that contrary to what DW1 is suggesting, the deceased is trying to defend herself and using her forearm and hand to fend off attack. This court is more inclined to believe from the testimony of PW2 that the aggressor is not the deceased. If it is not the deceased then it can only be DW1.

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[8] Learned counsel further submitted that how the appellant sustained his injuries to his neck and his arm was never considered by the learned trial judge. However he said that the trial judge concluded from the evidence of PW4 (the brother in law of deceased) that the appellant was the one who stabbed himself in the neck.

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[9] Again we disagree with learned counsel. Based on the testimony of PW4 (see the appeal record Vol 2 (1) page 53), he said that he rushed into the house upon hearing the deceased screaming out his name and after kicking the door of the bedroom open, he saw the deceased lying on the floor and also the appellant standing near the deceased holding something shiny. Then PW4 saw the appellant inflicting his own injuries by stabbing his own stomach and neck.

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[10] Learned counsel for the appellant submitted that PW4's testimony regarding the injury to the appellant's neck was contradicted by the evidence of his sister (PW6) who had followed him into the same room. It was submitted that PW6 never said anything about the appellant injuring himself.

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[11] We are of the view that even if PW6 never said anything about the appellant stabbing himself, it does not mean that PW4's testimony which said that he did, could not be believed. PW6 said that when she entered the room together with PW4, she saw the deceased lying on the floor and giving some kind of signal to them not to enter the room by waving her hand fast and pointing to the appellant. After that she said she got scared and ran out of the room. In fact, PW6 was recalled and became DW2. Then when asked by defence counsel at that stage, DW2 (PW6) said she did not see the appellant injure himself. But she did see the appellant holding something shining towards his throat after which she left the room as she was scared, understandably. We can only come to the same conclusion arrived at by the learned trial judge regarding the evidence of PW4 and PW6 when His Lordship stated as follows:

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This court cautioned itself that both PW4 and PW6 are siblings to the deceased there is nothing to suggest that they are unreliable witnesses. PW4 would appear to this court as a reluctant witness and PW6, maintained her story throughout even when she was later recalled to the witness stand again.

A (See the appeal record Vol 2 (2) at p 266).

B [12] Essentially, it is a finding of fact by the trial judge. His Lordship made his findings based mainly on the testimonies of PW4 and PW6 and also that of the appellant and supported by the independent medical reports on both the deceased and the appellant. The learned trial judge came to the following conclusions based also on the evidence of the appellant. While the deceased was collecting her clothes from the bedroom, the appellant approached her and queried her as to why she was taking them. The deceased told him to mind his own business and to leave her alone. The appellant had tried to persuade the deceased to stay and if there was anything, they could always discuss. After that a quarrel broke out between them whereupon the deceased took a knife which was on top of the cupboard and warned the appellant not to get too near or she would stab him with the knife. Not believing that the deceased would make good her threat, the appellant continued to approach her upon which the deceased stabbed him. A struggle ensued with the appellant trying to snatch the knife from the deceased. He managed to twist her arm to her back and when the deceased fell onto the floor, the appellant used the same knife to inflict the 19 injuries on the deceased which led to her death. Thereafter the appellant used the same knife to inflict injuries to himself as he was so in love with the deceased that he would not want to live anymore without her. The appellant then placed the knife onto the deceased's hand in order to cover up his own act and put the blame on the deceased instead.

F [13] At the risk of repetition we are of the view that the learned trial judge had made a reasonable conclusion based on all the evidence that it was not a case of self-defence. The learned trial judge found that the stabbing to death of the deceased by the appellant was not justifiable and unreasonable and such act was in excess of private defence especially done to a physically inferior and weaker person, see *Lee Thian Beng v Public Prosecutor* [1972] 1 MLJ 248 and *Public Prosecutor v Abdul Manap* [1956] MLJ 214.

H [14] In *Public Prosecutor v Ngoi Ming Sean* [1982] 1 MLJ 24 Ajaib Singh J (as he then was) explained the provisions of the right of private defence at p 25H as follows:

I The Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no such right where the person has time to seek the protection of the public authorities. Nor will this right of private defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person who exercises his right of private defence is under a reasonable apprehension that death or grievous hurt would be caused to him by the

assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body and this right continues so long as such apprehension of danger continues (see ss 96–102 of the Code). And it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body.

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We agree with the above to be the correct proposition of the law regarding the right of self-defence.

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[15] In the instant appeal, we agree with the learned trial judge that the killing was not justifiable as it was the appellant who initiated the aggression by advancing towards the deceased even after she had warned him not to do so while having a knife in her hand. His aggression culminated in his multiple stabbings of the deceased even after there was no imminent danger to his own life because the deceased had already fallen to the floor and was quite helpless at that material time when the appellant took the knife from her and stabbed her. His action was therefore not covered by the provisions of s 100(a) or (b) of the Penal Code.

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[16] In the course of his submission, learned counsel for the appellant however raised another issue about the trial court not having considered the exculpatory statement of the appellant. On this point we refer to the grounds of judgment of the Court of Appeal. Although the Court of Appeal found that the learned trial judge did not advert to the appellant's cautioned statement (exh D2), it found that nothing was said in D2 that the appellant had acted in self-defence. The appellant could have easily said so in his cautioned statement. If he had, then it may be used to corroborate his testimony in court later. As such, the Court of Appeal held that since there was nothing in D2 for the trial judge to consider as corroboration of the appellant's testimony in court it was of the view that the evidence had been fully considered and appreciated by the learned trial judge. The Court of Appeal also found there was no misdirection by the learned trial judge when His Lordship was of the view that the appellant had been less than truthful in his testimony. It is trite that a finding on the credibility of a witness by a trial judge should not be disturbed by an appellate court (see *Ahmad Shah bin Hashim v Public Prosecutor* [1980] 1 MLJ 77).

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[17] Likewise it is also trite that the appellate court should not disturb the findings of facts by the trial judge unless they are against the weight of evidence. Having considered the evidence in its totality and the reasons given by the learned trial judge and the concurrent findings by the Court of Appeal, we find no reason to interfere with the decisions made.

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[18] This appeal is therefore dismissed and the conviction and sentence upheld.

A [19] My learned brothers Zaki bin Tun Azmi Chief Justice and Alauddin bin Dato' Mohd Sheriff PCA have seen this judgment in draft and expressed their concurrence.

B *Appeal dismissed.*

Reported by Kanesh Sundrum

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